IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

Petitioner,

v.

JUAN CARLOS MORENO ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in affirming the District Court's decision that the University of Maryland's policy of refusing to allow aliens holding non-immigrant "G-4" visas to prove Maryland domicile for purposes of obtaining the lower,

in-state rates for tuition and fees, while at the same time using domicile as the basis for awarding such rates, violates the Due Process Clause.

2. Whether the decision below can in any event be supported on the ground that the University's policy toward G-4 aliens violates the Equal Protection Clause by discriminating against a class of aliens.

3. Whether the decision below can be supported on the further alternative ground that the policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions set forth in the Brief of Petitioner, this case involves Article VI, Cl. 2 (Supremacy Clause) of the Constitution of the United States:

[1]The issues involving the Equal Protection and Supremacy Clauses were raised in the respondents' complaint in the District Court and were briefed and argued there. However, since the trial judge ruled in the respondents' favor on the due process question, those issues were not decided either in that court or by the Fourth Circuit, which summarily affirmed the trial court's decision. Those points, however, may properly be raised by the respondents in this Court, since the respondents "may make any argument presented below that supports the judgment of the lower court." *Hankerson v. North Carolina*, ____ U.S. ____, 53 L.Ed.2d 306, 314, n. 6 (1977), 45 U.S.L.W. 4707 (June 17, 1977), *Massachusetts Mutual Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976); *Dandridge v. Williams*, 397 U.S. 471, 475 (1970); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931); and see Stern & Gressman, Supreme Court Practice, 314-315 (4th ed. 1969).

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

As permitted by Rule 38, the respondents at this point state facts which are relevant to this case but which were not set forth in the Brief of the Petitioner (hereinafter cited as "Pet. Br.").

The respondents are three students attending the University of Maryland. They reside in Maryland with their parents, upon whom they are financially dependent.[2] Their fathers are employees of international organizations – two employed by the Inter-American Development Bank ("IDB") and the third employed by the International Bank for Reconstruction and Development ("World Bank") – and as such hold non-immigrant alien visas issued pursuant to 8 U.S.C. §1101(a)(15)(G)(iv), known as "G-4" visas.[3]

[2]The petitioner suggests that respondent Juan Otero is now financially independent of his parents (Pet. Br. 12). This is not the case.

[3]G-4 visas are those issued to "[o]fficers, or employees of . . . international organizations [covered under the International Organizations Immunities Act, 22 U.S.C. 288], and the members of their immediate families."

The respondents entered the University as freshmen in the fall of 1974. Their applications for admission as Maryland residents and for "in-state" tuition rates were denied on the basis of a policy adopted by the University in September 1973. Under that policy, as the petitioner states, "the University . . . bases its award of in-state status on domicile" (Pet. Br. 11). Its policy document contains a general definition of domicile[4] and lists eight non-exclusive criteria for determining domicile (Pet. Br. 9). The University automatically denies in-state status to students who are, or are financially dependent upon, non-immigrant aliens – including holders of G-4 visas – because it presumes conclusively that such non-immigrant aliens "cannot establish the requisite intent necessary to create a Maryland domicile" (Pet. Br. 34).[5] We note, in particular, that one of the University's listed criteria for determining domicile is the payment of "Maryland income tax on all earned income" (Pet. Br. 9), and the international agreements establishing the IDB and the

[4] That definition is as follows:

> "A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time." Pet. Br. 8.

[5] Prior to September 1973, the University had also based the grant of in-state tuition rates on Maryland domicile, but had drawn no distinction between American citizens or permanent immigrants and aliens holding G-4 visas, so long as the parents of the student applicant had owned and occupied real property in Maryland for six months prior to the grant of in-state status. (Appendix (hereafter "App.") 22A, 24A).

World Bank preclude both the Federal Government and the States from collecting income taxes on the salaries received by any non-American citizens from those organizations.[6]

After unsuccessfully exhausting their administrative appeals within the University, the respondents filed a class action in the District Court on May 27, 1975. They alleged that the University's denial to G-4 visaholders and their children of the opportunity to prove in-state status violated the Due Process, Equal Protection, and Supremacy Clauses of the Constitution.[7] On July 13, 1976, the District Court ruled in the respondents' favor, holding that G-4 visaholders are not legally incapable of establishing Maryland domicile and that for the University, which bases its in-state rates on domicile, to presume conclusively that they are so incapable, without providing them the opportunity for a hearing on the question, is in these circumstances a denial of due process under *Vlandis v. Kline*, 412 U.S. 441

[6] See Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; and Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502. This tax exemption is granted for the benefit of the banks. The employees of the banks cannot waive the exemption. 40 Op. Atty. Gen. 131, 172-73 (1953).

[7] The District Court ultimately certified the suit as a proper class action. See Appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App.") at 50a-51a.

(1973), and similar cases.[8] The Fourth Circuit affirmed that ruling on April 28, 1977. 556 F.2d 573.

The particular facts with respect to each of the respondents are set forth in the District Court's opinion (Pet. App. 12a-15a). These show that the respondents are children of long-time employees of the two international organizations, and that the parents of the respondents have resided in Maryland and owned real estate in that State for periods of time varying from over 7 to over 15 years. The facts also establish that the respondents' parents have paid all Maryland taxes except taxes on their salaries paid by the IDB or the World Bank. The taxes paid include local real estate taxes, the state sales tax, motor vehicle, fuel, excise and other taxes, and in some cases federal and state income taxes on income other than salaries from the two international organizations. Two of the respondents attended elementary and secondary schools in the United States without interruption. The mother of one of the respondents is a citizen of the United States and is registered to vote in Maryland. All of the respondents' parents have their automobiles registered in Maryland. The respondents' fathers hold their positions with the banks on a long-term, indefinite basis; their employment is not for a fixed term or period of time. During the course of the appeal proceedings before University officials, the respondents

[8] Although the District Court stayed the effect of the judgment, it required the petitioner and the University to agree to a refund for the class represented by the respondents if the respondents prevailed on appeal. The same condition applies pending decision in this Court.

and their parents stated that they have no present intention to reside anywhere other than in Maryland.

We should also point out that the University has admitted that, under its policy for determining in-state admission and tuition status,[9] an *immigrant* alien could show Maryland domicile even if he was exempt from Maryland income tax (Pet. App. 42a). However, in order for a G-4 alien or any non-immigrant alien who plans to work in the United States (other than a child, spouse, or, in some circumstances, sibling of an American citizen or immigrant alien) to change his visa status to that of immigrant, he must obtain the certification of the Secretary of Labor that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform that work, and that this employment will not adversely affect the working conditions of American workers. 8 U.S.C. §1182(a)(14).[10] With certain exceptions inapplicable here, obtaining such a certification requires the

[9] The University's policy embraces "Admission . . . Purposes" (Pet. Br. 6), as well as charge-differential purposes. Although not in the record, it is a fact that the number of out-of-state applicants who are accepted for admission to the University of Maryland, both on the graduate and undergraduate levels, constitutes a far smaller percentage of such applicants than is the case with respect to the number of in-state applicants who are accepted for admission out of the pool of in-state applicants.

[10] The petitioner claims that G-4 visaholders can acquire immigrant status without obtaining the labor certification if they do so as parents of citizens or permanent resident aliens (Pet. Br. 28 n. 15). However, under 8 U.S.C. §1182(a)(14), as amended by §5 of Pub. L. No. 94-571, 94th Cong., 2d Sess. (Oct. 20, 1976), 90 Stat. 2705, parents of citizens under 21 or of permanent resident aliens are no longer excluded from the labor certification requirement.

alien's employer to file a form relating to the alien's qualifications and a form containing a job offer to the alien. 29 C.F.R. §§60.3(e)(1) and (2) (1976). The IDB and the World Bank do not file such forms for several reasons. They are "international organizations," not United States employers, and they are required by the agreements establishing them to give "due regard to the importance of recruiting the staff on as wide a geographic basis as possible."[11] Thus, the banks cannot certify, as required by the prescribed job offer form, that they have looked for and cannot find United States citizens who are equally qualified. Moreover, the banks interpret the provision requiring due regard to be paid to "recruiting the staff on as wide a geographic basis as possible," and the establishment by Congress of a separate visa category for aliens working for international organizations, as inhibiting them from assisting staff members in efforts to acquire immigrant status in the United States while such persons are employed by the banks (App. 21, 24-25). Indeed, the banks prohibit their G-4 employees from so changing their visa status except in very exceptional circumstances (such as in the case of an employee about to retire). The respondents have no control over these policies of the IDB and the World Bank.

[11] Art. VIII, §5(e), 10 U.S.T. 3029, T.I.A.S. No. 4397; Art. V, §5(d), 60 Stat. 1440, T.I.A.S. No. 1502.

SUMMARY OF ARGUMENT

Due Process

The courts below relied on *Vlandis v. Kline*, 412 U.S. 441 (1973), to hold that the University of Maryland's policy barring all non-immigrant aliens, including the holders of G-4 visas, from proving Maryland domicile so as to obtain "in-state" tuition and fee status denied due process of law to the G-4 visaholders. In *Vlandis*, the Court struck down a Connecticut statute which purported to be concerned with residency in allocating the tuition and fee rates at the state university, but then barred all individuals who had applied to the University from out of State from ever showing residency in Connecticut, on the basis of a permanent and irrebuttable presumption that they were non-residents. The Court held that this irrebuttable presumption violated the Due Process Clause since it was not universally true in fact and since the State had reasonable alternative means of making the crucial determination of residence.

The present case is very similar to and is governed by *Vlandis*. The University of Maryland admittedly purports to be concerned with domicile as the test for in-state status; but it then denies to a group of individuals seeking to meet that test – G-4 and other non-immigrant visaholders – any opportunity to prove that they do so, on the basis of a conclusive presumption that they cannot have the requisite intent to establish Maryland domicile. Contrary to the petitioner's contention, this conclusive presumption is just as "permanent" as was the one in *Vlandis*. While in both cases a change in status (here a change in visa

status to immigrant, and in *Vlandis* a change in student status to non-student for a year) would give an individual a chance to prove in-state domicile, the conclusive presumption of non-domicile here is permanent for as long as the G-4 visaholders remain in G-4 status, just as the one in *Vlandis* was permanent for as long as the students remained in student status. Moreover, as shown on pp. 7 - 8 above, the IDB and the World Bank do not file the forms that are necessary in most cases for their employees to change their visa status from G-4 to immigrant.

The petitioner further contends that the conclusive presumption here, unlike that in *Vlandis*, is universally true in fact since, he claims, non-immigrant aliens cannot have the intent necessary to be domiciled in Maryland. As the District Court found, however, that conclusive presumption is not universally true in fact for G-4 visaholders. The University's own definition of domicile, which tracks the Maryland law, turns on the intention to live permanently or indefinitely in Maryland, and under Maryland law there is no reason why G-4 visaholders cannot have that intention. Likewise, nothing in the federal immigration laws precludes that intent. To the contrary, Congress specifically exempted the holders of G-4 visas and those in a few other non-immigrant visa categories from the requirement, applicable to most categories of non-immigrants, that they maintain a foreign domicile or that they enter the United States for only a specific temporary purpose. Thus, it is possible for G-4 visaholders to be domiciled in Maryland.

Furthermore, the interests asserted by the petitioner in support of the University's policy can no more

justify that policy than did the State's interests in *Vlandis*. Indeed, the petitioner's asserted interests of cost equalization and administrative efficiency were specifically rejected in *Vlandis*. The asserted interest in limiting expenditures to those with a greater national affinity was held by this Court in *Nyquist v. Mauclet*, ____ U.S. ____, 53 L.Ed.2d 63, 45 U.S.L.W. 4655 (June 13, 1977), to be an impermissible interest for a State. And the alleged interest in treating all non-immigrants alike cannot stand, in light of the fact that different categories of non-immigrants are in fact and under the federal immigration laws differently situated with respect to their ability to establish domicile in this country.

For these reasons, *Vlandis* compels the conclusion that the University's policy here denies due process.

The petitioner and his supporting *amici curiae*, however, argue that *Vlandis* has been so eroded by subsequent decisions of this Court that it should be overruled. They place primary reliance in this regard on *Weinberger v. Salfi*, 422 U.S. 749 (1975). While it is true that *Salfi* and subsequent cases put limits on a broad reading and applicability of the *Vlandis* rationale, they specifically preserved that case. And as this Court has recognized, the *Vlandis* doctrine, as limited in accordance with subsequent decisions to its core due process principle and as applied to cases with facts like those in *Vlandis* and the present case, falls plainly within the scope of procedural due process.

The Court in *Salfi* recognized a distinction, for due process purposes, between enactments that condition benefits upon compliance with a flat, objective eligibility criterion on which individuals can present

evidence, and enactments that condition benefits or detriments upon a particular fact that is deemed to be crucial and then, on the basis of a conclusive presumption that a certain class of people cannot meet that factual test, deny those people any opportunity to prove the contrary. This distinction is proper. Where the State makes clear its concern with a particular fact and makes that fact crucial to the entitlement to property or enjoyment of liberty, its use of a conclusive presumption to deny a certain class of people the opportunity to prove that fact, when that presumption is not universally true in fact, implicates established concerns of fairness and procedural due process. Of course, this does not mean that courts should search for such conclusive presumptions in all legislative enactments by looking behind the language of the enactments to the possible purposes for them. To do so would constitute undue judicial intervention into the legislative function. But such considerations do not apply where it is clear from the face of the enactment or is otherwise obvious that the enactment has made a certain fact crucial and then has concluded the inquiry into that fact for a certain class of people. It is plain here that, under the University's policy, Maryland domicile is the crucial fact for an award of in-state status, and that the University precludes all non-immigrant aliens from proving such domicile, on the basis of a conclusive presumption that they cannot have the requisite domiciliary intent. Since that conclusive presumption is not universally true in fact for G-4 visaholders, principles of procedural due process require a careful scrutiny of the policy.

Such a conclusive presumption could be justified only if the State's difficulties in determining the crucial fact through individualized hearings would be substantial and would outweigh the individual's interests affected. Here, the University's policy burdens the G-4 students' important interest in securing a public education, and the University would have very little difficulty in ascertaining their domicile or that of their parents through individualized hearings. The University already has a hearing procedure which it uses to inquire into the domicile of citizens and immigrant aliens, and indeed it uses that same procedure for non-immigrants to inquire into other facts (such as changes in immigration status). It would take little, if any, extra time for the University also to consider domicile for the holders of G-4 visas and of those few other visa types that permit establishment of an American domicile, particularly since there would appear to be relatively few such visaholders. In these circumstances, the Due Process Clause requires the holding of individual hearings on the crucial fact – domicile – rather than the use of the unfair conclusive presumption.

Application of the *Vlandis* doctrine under this analysis is consistent with the decisions cited by the petitioner, has been recognized by members of this Court and by commentators, and comports with recognized principles of procedural due process. Hence, *Vlandis* should be preserved as applied under that analysis, and such application here shows that the University's conclusive presumption of non-domicile for G-4 visaholders was properly held by the lower courts to constitute a denial of due process.

Equal Protection

While the courts below did not reach the respondents' argument that the University's policy violates the Equal Protection Clause, the respondents reassert that argument here and show that it provides a separate and wholly adequate ground for affirming the judgment below.

This Court's decision last Term in *Nyquist v. Mauclet, supra,* reaffirmed the established principle that state classifications based on alienage are inherently suspect and are subject to strict judicial scrutiny in determining whether they violate the Equal Protection Clause. In that case, moreover, the Court held that this principle applies not only to classifications that harm *all* aliens, but also to classifications that harm only a subclass of aliens, so long as only aliens are disadvantaged.

Nyquist directly governs this case. The University's policy at issue here clearly treats non-immigrant aliens differently from citizens and immigrant aliens. Citizens and immigrant aliens are permitted to prove Maryland domicile and thus to obtain in-state status. Non-immigrant aliens are not. The petitioner's contention that the policy is not a discrimination against the non-immigrant class of aliens, but only against non-domiciliaries of Maryland, is based on his position that non-immigrant aliens as a class are in fact unable to be domiciled in Maryland. As we have stated, this is not necessarily or universally true for the holders of G-4 visas and the few similar types of visas that permit creation of an American domicile. Yet the G-4 and similar non-immigrant visaholders who are in fact

domiciled in Maryland are precluded by the University's policy from proving their domicile. Citizens and immigrant aliens domiciled in Maryland face no such restriction. This classification obviously is directed at and disadvantages *only* aliens (even though not all aliens) and hence, under *Nyquist,* is a suspect classification subject to struct scrutiny.

As the petitioner has conceded, the interests asserted in support of the University's policy will not withstand a strict scrutiny test. Therefore, the policy denies to G-4 visaholders the equal protection of the laws.

Supremacy Clause

The respondents finally assert, as an additional alternative ground for affirmance, that the University's policy intrudes upon the exclusive federal power and policies in the immigration field, in violation of the Supremacy Clause of the Constitution.

ARGUMENT

I.

THE UNIVERSITY'S POLICY BARRING HOLDERS OF G-4 VISAS FROM THE OPPORTUNITY TO PROVE MARYLAND DOMICILE VIOLATES THE DUE PROCESS CLAUSE.

In the courts below, the respondents relied successfully on *Vlandis v. Kline,* 412 U.S. 441 (1973), in

maintaining that the University's policy of denying absolutely an opportunity for the holder of the G-4 visa to show that he is domiciled in Maryland violated the Due Process Clause. In *Vlandis*, this Court, relying on principles previously invoked in *Bell v. Burson*, 402 U.S. 535 (1971), and *Stanley v. Illinois*, 405 U.S. 645 (1972), held unconstitutional a Connecticut statute which set up a mechanical and automatic bar, similar to the University's policy here, that prohibited certain students from showing residence in the State for purposes of obtaining in-state rates for tuition and fees at the state university. The Connecticut statute established a presumption that a student was a non-resident – and thus barred him from showing that he had established domicile in Connecticut – if he had a legal address outside the State during the year before he applied (if single) or at the time of his application (if married). This Court held that it was a denial of due process to establish such a presumption and to deny an applicant the right to prove that his domicile was within the State either at the time of application or at a subsequent time during the period of his attendance at the University. The Court stated:

> "It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category. Indeed, in the present case, both appellees possess many of the indicia of Connecticut residency, such as year-round Connecticut homes, Connecticut drivers' licenses, car registrations, voter registrations, etc. . . ." 412 U.S. at 448.

The Court summarized its holding as follows:

> "In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452.

The present case is very similar to *Vlandis*. The University admittedly purports to be concerned with domicile in determining admission and in allocating the rates for its tuition and fees.[12] Yet it has erected an irrebuttable presumption that the holders of G-4 and other non-immigrant visas may never be domiciled in Maryland for purposes of admission and of obtaining in-state tuition and fee status.[13] It makes no attempt to

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[12] See Pet. Br. 11, stating that like "most other public institutions of higher education, the University of Maryland bases its award of in-state status on domicile"; Pet. App. 32a, where the District Court noted that, according to the defendants, "domicile is the basis on which tuition rates are determined"; and Pet. App. 41a, where the District Court itself referred to the determination of domicile as the "crucial determination" under the University's policy.

[13] See Pet. Br. 11, which states that "the University does not further examine other domiciliary factors because such individuals [*i.e.*, non immigrant aliens] cannot have the requisite legal intent to establish Maryland domicile." Similarly, the University "views nonimmigrant aliens as being under a legal disability which precludes the intent to be domiciled in Maryland . . ." Pet. Br. 11. See also Pet. Br. 12, 34, and 35.

distinguish between those G-4 aliens (or other non-immigrant aliens) who may intend to reside indefinitely in Maryland and thus, under the properly considered indicia, would be considered domiciled there, and those who do not so intend. Rather, it simply treats all such non-immigrant aliens as non-residents of the State, and denies them in-state treatment for purposes of admission and tuition rates, on the basis of a conclusive presumption that they are not Maryland domiciliaries. For this reason, the courts below relied on *Vlandis* to strike down the University's policy as a denial of due process.

The petitioner in this Court advances two basic arguments why the decision below should be reversed: (1) that the courts below misapplied *Vlandis* to the facts of this case and that therefore *Vlandis* does not govern here; and (2) that *Vlandis* has been so eroded by subsequent decisions that this Court should overrule it. We now show that neither of these contentions should prevail.

A. The Present Case Is Governed by *Vlandis v. Kline*.

The petitioner's initial argument is that this Court's decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and subsequent decisions show that *Vlandis* was improperly applied by the courts below in the instant case, because under *Salfi* and its progeny classifications which do not affect "fundamental" constitutional rights do not give rise to irrebuttable presumptions in violation of the Due Process Clause if such presumptions are rationally related to a legitimate objective

(Pet. Br. 16-17, 18-26). In effect, the petitioner's argument here is that *Salfi* and subsequent cases of this Court have overruled *Vlandis*, since the right affected by the statute in the latter case was no more "fundamental" than that at stake in the present case, and since, as shown above, the policy of the University of Maryland creates a conclusive presumption just as much as did the statute which this Court struck down in *Vlandis*.

While this Court's decisions in *Salfi* and subsequent cases cut back on the broad applicability of *Vlandis*, they did not overrule it, but left it standing as applied to its facts and to similar cases. In *Salfi*, for example, the Court specifically distinguished and preserved *Vlandis* as applied to cases like it and the present case, where the State purports to be concerned with a particular factual test (*e.g.*, residency or domicile) and then denies individuals seeking to meet that test the opportunity to present and have considered plainly relevant evidence of the fact deemed crucial. 422 U.S. at 771, 772. This distinction drawn in *Salfi* is discussed more fully on pp. 43-44, *infra*. Likewise, as also discussed below (pp. 57-61, *infra*), the other cases cited by the petitioner did not overrule *Vlandis*.

Thus, *Vlandis* has not been overruled. The question whether *Salfi* and subsequent cases have so eroded *Vlandis* that it is no longer viable and should now be overruled is discussed on pp. 47-66, *infra*. However, before answering this major contention of the petitioner – and of the amici curiae supporting him – we will demonstrate that, for due process purposes, the present case is indistinguishable from *Vlandis* and that *Vlandis* therefore controls the result here.

1. The University's Policy Here Creates a Conclusive Presumption Like That in *Vlandis*.

In fashioning its admissions policy and in allocating its rates for tuition and fees, the University of Maryland purports to be concerned with domicile as the test for in-state status.[14] Yet at the same time, it denies to a group of individuals seeking to meet that test – G-4 visaholders – any opportunity to prove that they are domiciled in Maryland. The University's policy thus establishes an irrebuttable presumption like that in *Vlandis*, which concludes, without a hearing, any inquiry into the fact that the University deems crucial.

The petitioner attempts to distinguish the presumption here from that in *Vlandis* by maintaining that, unlike the students in that case, "who could never qualify for in-state status" (Pet. Br. 27), these respondents do have the opportunity to qualify for in-state status by altering their immigration status, or having their parents alter theirs, to that of permanent resident alien. Therefore, the petitioner argues, the presumption here is not permanent (Pet. Br. 27-28). For this point, he relies on *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd.*, 401 U.S. 985 (1971), where the lower court upheld a one-year residency requirement which allowed students from out of state to present evidence of in-state residence after living in the state for one year.[15]

[14]See references cited in note 12, p.17 , *supra*.

[15]Pet. Br. 19, 27-28. The petitioner also cites *Kirk v. Board of Regents of the University of California*, 78 Cal. Rptr. 260, 273 Cal. App. 2d 430 (1969), *app. dism.*, 396 U.S. 554 (1970), where a similar one-year residency requirement for in-state status was upheld.

This attempted distinction of *Vlandis* cannot stand up. Contrary to the petitioner's contention, the students in *Vlandis could* have qualified for the in-state rates by moving to Connecticut for a year before applying to the university or by dropping out of the university for a year, living in Connecticut for that year, and then reapplying. Such a possibility of a change in status could not save the irrebuttable presumption in *Vlandis*, for the presumption was permanent for as long as the students remained in student status. See 412 U.S. at 453 n. 9. By contrast, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status. No change in status was required. The University of Maryland's policy at issue here is like that in *Vlandis* rather than that in *Starns*. Its irrebuttable presumption of non-domicile is permanent for as long as the students or their parents remain in G-4 status. The fact that they might change their status in order to avoid the presumption, as the students in *Vlandis* also could have done, cannot cure the constitutional defect.[16]

[16]Moreover, the requirement that G-4 visaholders change their status from G-4 to permanent resident in order to be eligible for in-state treatment at the University would impose an arbitrary and unreasonable burden on such individuals. As discussed on pp. 7-8, *supra*, the IDB and the World Bank do not file the forms necessary for their employees to adjust their visa status to permanent resident, and indeed prohibit their employees from making such a change except in unusual circumstances. Thus, the theoretical possibility of a change in visa status for employees of these international organizations cannot save the University's irrebuttable presumption of non-domicile for these G-4 aliens from unconstitutionality. See *Robertson v. Regents of the University of New Mexico*, 350 F. Supp. 100, 101-02 (D.N.M. 1972); accord, *Covell v. Douglas*, 501 P.2d 1047, 1048 (Colo. 1972).

2. The Interests Asserted in Support of the University's Policy Can No More Justify That Policy Than Did the State's Interests in *Vlandis*.

The petitioner asserts several interests of the University which, in his opinion, suffice to justify its policy with respect to the admission and tuition status of non-immigrant aliens, including holders of G-4 visas. As in *Vlandis*, however, these interests do not suffice.

(a) First, the petitioner purports to draw comfort from this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976), upholding a congressional scheme that granted Medicare benefits to citizens and permanent resident aliens who had resided in this country for at least five years, but denied such benefits to other aliens. That scheme was upheld on the grounds that the amount of such benefits was not limitless and that Congress could reasonably draw the line as it had because as a class the persons to whom benefits were granted could be expected to have a greater affinity with the United States. *Id.* at 83. The petitioner contends that this same "national affinity" interest can justify the University's policy here (Pet. Br. 29-31).

In *Mathews v. Diaz*, however, the Court based its decision squarely on the plenary power of the Congress over aliens, which is, for the most part, "committed to the political branches of the Federal government." *Id.* at 81. Moreover, the Court made it clear in *Mathews* that the considerations and policies applicable in that area do not apply to *state* actions affecting aliens. *Id.* at 84-87. In *Nyquist v. Mauclet* ____ U.S. ____, 53 L.Ed.2d 63, 71, 45 U.S.L.W. 4655 (June 13, 1977), the Court last Term

confirmed explicitly that the "national affinity" interest "is not a permissible one for a State."[17]

(b) Next, the petitioner claims that "the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.* nonimmigrants and other nonresidents" (Pet. Br. 31).

The purported justification based on an attempt at cost equalization according to past tax contributions is precisely the interest rejected in *Vlandis* as insufficient to justify the irrebuttable presumption of nonresidence. 412 U.S. at 448-50. Moreover, like the presumption in *Vlandis*, the University's policy here is unrelated to the objective of cost equalization. Its policy would allow a citizen or immigrant visaholder whose family had lived in Maryland only a very short time and had not contributed significantly to the State's tax revenues to

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[17] In *Nyquist*, the Court held that a state statute which barred a certain class of aliens from receiving education benefits discriminated against that class of aliens in violation of the Equal Protection Clause. The petitioner attempts to distinguish *Nyquist* on the ground that the University's policy here does not discriminate against a class of aliens, but treats all non-domiciliaries of Maryland alike, including citizens and immigrant aliens as well as non-immigrant aliens (Pet. Br. 30). We answer this contention below in connection with our equal protection argument. See pp. 71-72, *infra*. As we show there, the University's policy does not treat non-immigrant aliens as it does citizens and immigrant aliens. Citizens and immigrant aliens are permitted to show Maryland domicile. Non-immigrant aliens are not, even if they are in fact domiciled in Maryland (which, as we show on pp. 29-41, *infra*, is possible for G-4 visaholders).

pay in-state rates. But it denies those rates to the respondents, despite the fact that each respondent's family has resided in Maryland for a number of years (Moreno, 13 years; Otero, 11 years; Hogg, 6 years), and has paid all Maryland state and Montgomery County property taxes on their homes, as well as all state and local retail taxes, motor vehicle taxes, fuel taxes, excise taxes, and other taxes required of them by law. See Pet. App. 12a-15a.

Furthermore, the lack of a relationship between the University's policy and the asserted interest in cost equalization based on tax payments is shown by the fact that officials of the University have formally stated that it is their policy to permit the parent of a student, if such parent holds an *immigrant* visa, to establish domicile in Maryland, whether or not the parent currently pays Maryland income tax, provided that such a parent can exhibit all the other relevant domiciliary criteria (Pet. App. 42a n. 15). If an alien holding a G-4 visa and employed by an international organization, such as those employing respondents' fathers, succeeded in changing his status to that of immigrant, as the University requires, his salary from the organization would still be exempt from federal and state income tax. He would thus have taken the steps required by the University with regard to his immigration status and would be allowed to show Maryland domicile for purposes of obtaining the in-state rates for his family, but he would not have advanced the University's asserted objective of "cost equalization" one iota.

(c) Another allegedly "sufficient interest" in support of the University's policy on in-state status is said by the petitioner to be "the administrative difficulties presented by individualized hearings for the University's

large nonimmigrant student population" (Pet. Br. 32). Such an asserted interest, too, was rejected in *Vlandis*, 412 U.S. at 451-52, as well as in *Stanley v. Illinois*, *supra*, 405 U.S. at 656, as insufficient to justify use of the irrebuttable presumptions there. In this case, as in *Vlandis*, the University has a reasonably available method, apart from relying on its irrebuttable presumption, to ascertain whether G-4 visaholders in fact have the intent required for domicile in Maryland. It is the method used for American citizens and, according to the most recent expression of the University's policies, for those who hold immigrant visas – namely, collecting documents and conducting interviews in accordance with the procedures set forth in the University's September 21, 1973, Statement of Policy (Pet. Br. 6-10). Indeed, even the respondents were required to submit materials and to appear for extensive interviews pursuant to these procedures, although the evidence they presented on the question of their domicile in Maryland was deemed irrelevant and not considered in denying them in-state status (App. 6A-9A). In order to have a true fact-finding method to determine the domicile of G-4 aliens, the University need only assess objectively the information which it now holds but insists it must ignore.

Moreover, the University's speculative concern at the increase in the number and scope of individualized hearings which might be required if the respondents should prevail in this case cannot be given much weight. Although not a fact in the record of this case, the petitioner states that in the Fall of 1975 "more than 550 nonimmigrants were registered at the University of Maryland" (Pet. Br. 32 n. 18). On the other hand,

respondents can assure the Court that of the 550 or so non-immigrants whom the petitioner estimates to be in attendance at the University, just over 50 students are children of G-4 visaholders who are employed by the IDB and the World Bank. Even allowing for additional students at the University who are children of employees of the International Monetary Fund, the Organization of American States, and a few other international organizations whose headquarters are located in the Washington, D.C. area, it is not likely that the total number of students in the class for whom the respondents speak would be much more.[18] Apart from G-4 visas, there are many other categories of non-immigrant visas; and it seems probable that the great majority of non-immigrant alien students at the University of Maryland fall into visa categories which, as we discuss in more detail below, unlike the G-4 visa, may not permit the establishment of American domicile.[19] For example, many are undoubtedly foreign students who are temporarily in the United States pursuant to a visa which requires such students to have "a residence in a foreign country which [they have] no

[18]Furthermore, of course, only about a quarter of the G-4 students in the University would be entering the University in any one year.

[19]In this connection, it is instructive to note a citation by the petitioner to the effect that the number of non-immigrants admitted each year exceeds 3 million (Pet. Br. 31 n. 17). We have been informed by the Director of the Public Information Office of the Immigration and Naturalization Service that the number of G-4 visaholders in the United States as of November 1977 was 25,142. Of this number, surely well under 100 attended the University of Maryland.

intention of abandoning." 8 U.S.C. §1101(a)(15)(F). That the University will have to make an individualized determination of domicile as to those non-immigrant students whose visas *do* allow the establishment of Maryland domicile, as G-4 visas do, by following the very same procedures that it currently uses for citizens and permanent resident aliens, would certainly create no more, and probably less, additional administrative burden than did the individualized determinations required in *Vlandis* and *Stanley*. That alleged burden on the University, therefore, cannot justify its use of the irrebuttable presumption of non-domicile for all G-4 aliens.[20]

(d) The petitioner's final assertion of an interest purportedly justifying the University's policy is that that policy prevents "disparate treatment" among non-immigrant aliens (Pet. Br. 32-33). The petitioner contends that for the University to permit G-4 and similar non-immigrant visaholders who do not have to maintain an overseas domicile the opportunity to show Maryland domicile, while at the same time denying that opportunity to other non-immigrants, such as foreign students who are in this country temporarily and must

[20]We point out further that most of the States who have joined in the brief for amici curiae in support of the petitioner would have a very minimal interest in whether G-4 aliens are allowed to prove in-state domicile. The Washington, D.C., and New York City areas are the two areas where international organizations have their headquarters in this country; and hence it is highly unlikely that there would be any appreciable number of G-4 visaholders in States other than the six in those areas—namely, the District of Columbia, Maryland, Virginia, New York, Connecticut, and New Jersey.

maintain an overseas domicile, affords the former class "preferential treatment," which ought not to be allowed.[21] The short answer to this argument is that it seeks to equate persons who are in fact and under the federal immigration laws differently situated. That is, it would draw no difference between persons who are in the United States temporarily and for limited purposes – such as foreign students, temporary visitors for business or pleasure, aliens "in immediate and continuous transit," 8 U.S.C. §1101(a)(15)(C), alien crewmen

[21] As he did earlier in his brief (Pet. Br. 13-14 n. 5), the petitioner again refers to the holders of G-4 visas as "generally affluent" aliens, *id.* at 33, who, he says, "hold lucrative and responsible positions with their respective employers," *id.* at 14. There is, of course, no evidence in the record that the holders of G-4 visas, as a class, are more affluent than any other non-immigrant aliens, such as the parents of foreign students who attend the University of Maryland on a student visa. Moreover, as the respondents have pointed out in this brief, the exemption from federal and state income taxes which the employees of the two banks enjoy applies only to the salaries which they receive from the banks and not to any other income they may receive. Finally, the immunities and exemptions afforded to employees of international organizations are strictly "functional" in nature and are not to be equated with the complete diplomatic immunity enjoyed by ambassadors, personal representatives of foreign nations, and other diplomats stationed in the United States. See Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 Wash. & Lee L. Rev. 91, 128-130 (1976). In any event, the relevancy of the salary which the respondents' fathers receive, the scope of their privileges and immunities as employees of international organizations, and the fact that they, as employees of those organizations, are exempt from federal and state income tax on their salaries eludes the respondents.

who intend to land "temporarily and solely in pursuit of [their] calling," 8 U.S.C. §1101(a)(15)(D), etc. – and aliens, like the respondents, whose parents intend to reside in the United States indefinitely and to live permanently and indefinitely in Maryland. See pp. 35-37, *infra*.

3. The University's Conclusive Presumption of Non-Domicile for G-4 Visaholders Is Not Universally True.

The petitioner also argues that even if the University's policy has erected a permanent irrebuttable presumption of non-domicile for all non-immigrant aliens, including G-4 visaholders, such a presumption is nevertheless valid under *Vlandis*, for it is, according to the petitioner, universally true in fact (Pet. Br. 33-38). This is so, the petitioner contends, because non-immigrant aliens "cannot establish the requisite intent necessary to create a Maryland domicile for in-state tuition because of the terms and conditions upon which they continue to reside in this country" (*id.* at 34). The District Court, however, found to the contrary (Pet. App. 32a-40a); and this Court has held that, even where the state courts have not ruled on a question of state law, the Court will afford great deference to the construction of state law by the district judge who sits in the State and whose construction was upheld by the court of appeals. *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976). In any event, the District Court's finding on the point in question here was clearly correct.

As stated above, the University, in determining admission and rates for tuition and fees, purports to be

concerned with the domicile of the student or his parents. The University's statement of policy of September 21, 1973, defines domicile as follows:

> "A domicile is a person's permanent place of abode; namely, there must be demonstrated an *intention* to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time" (Pet. Br. 8) (emphasis added).

The same statement lists a set of eight criteria which the University is to consider in determining domicile, including: year-round ownership, rental, or occupation of property; the maintenance of a substantially uninterrupted presence within Maryland; the maintenance within Maryland of personal possessions; the payment of Maryland income tax on all earned income; the registration of motor vehicles in Maryland; the possession of a Maryland driver's license; registration to vote in Maryland, if registered; and the giving of a Maryland home address on federal and state income tax forms (Pet. Br. 9).

As the September 21, 1973, statement indicates, however, these indicia are only criteria to be considered in assessing a person's intent. This primary role of intent in establishing domicile is in accord with the broadly accepted view. As this Court said in *District of Columbia v. Murphy*, 314 U.S. 441, 454-455 (1941), "we hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled" (footnote omitted). See also Restatement of Conflicts (2d), §18. Likewise, as the petitioner states, "[t]he University's in-state policy tracks the [Maryland] law of domicile" (Pet. Br. 34). The Maryland Court

of Appeals defined domicile in *Shenton v. Abbott*, 178 Md. 526, 530, 15 A.2d 906, 908 (1940):

> "A person's domicile is the place with which he has a settled connection for legal purposes, either because his home is there or because that place is assigned to him by the law. It is well defined as that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning."

The court made clear that, if a person has established a new domicile, a "floating intention to return to his former domicil at some future time" does not negate the intent to establish the new domicile. *Id.*, 178 Md. at 533, 15 A.2d at 909.

There can be no doubt that G-4 visaholders, such as the respondents and their families in this case, can exhibit all relevant indicia of having domiciles in Maryland under the "permanent or indefinite intention" standard of the University's policy and of state law. Respondents and their parents have all lived in the United States and in Maryland for a number of years, own their own homes in Maryland, maintain substantially all personal possessions in Maryland, and do not maintain residences elsewhere. All have registered their automobiles in Maryland and hold Maryland drivers' licenses. None votes outside Maryland; Mrs. Otero, an American citizen, votes in Maryland. All give a Maryland home address when they file state and federal income tax forms.

Moreover, the respondents and their parents pay all Maryland state taxes lawfully levied upon them. The father in each family is employed by an international

organization. Pursuant to international agreements to which the United States is a party, no state or federal income tax may be levied on the salaries of non-American employees of the organizations employing respondents' fathers, the IDB and the World Bank.[22] This arrangement is not a gratuitous benefit conferred on the respondents' fathers by the United States, but is for the benefit of the organizations and their member nations. Under the same agreements, reciprocally, no foreign income tax may be levied on United States citizens residing abroad in the banks' employ. Thus, no Maryland state income tax is paid upon the income from each father's salary, although, in the case of one family, the Hoggs, Maryland state income tax is paid on other income (App. 10A).

The University has had ample opportunity to be fully informed on all indicia relevant to the respondents' and their parents' domicile through the documentary materials they have required the respondents to submit and through the extensive personal interviews with the respondents and their fathers conducted by the Director of Admissions and the Assistant Director of Admissions. See p. 25, *supra*.

[22]Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397, Art. XI, §9(b) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to . . . employees of the Bank who are not local citizens or other local nationals"); Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502, Art. VII, §9(b) (wording identical to that for the IDB, but concluding ". . . local citizens, local subjects, or other local nationals").

The employment of respondents' fathers at the World Bank and the IDB does not conflict in any way with the intent necessary in order to establish domicile in the State of Maryland. Each of respondents' fathers has come to the headquarters of the international organization in question to pursue a full career at that location. Each has been employed at that location for 13-14 years and has no intention to work elsewhere. The Restatement of Conflicts (2d), Section 17h, draws a distinction, for purposes of establishing domicile, between jobs that constitute "life" appointments and appointments of a "cabinet" nature. Officials such as cabinet members serve at the pleasure of elected officials; ordinarily a change of political party or a change of administration will mean that their tenure is ended. A similar consideration applies to ambassadors and their staffs. But respondents' fathers' positions at the international organizations involved here are, for all practical purposes, "life" appointments, since they serve at the pleasure of no political administration and the nature of their work and of the organizations' operations are such that they may presumably expect to reside in the Washington area for their entire careers.[23] The circumstances might be different for an official who (unlike the employees of the IDB and the World Bank) had a job that required him to rotate frequently to posts outside Maryland. Even in such a case, however, once such an official established a

[23]For a comprehensive discussion of the status of the employees of international organizations, see Gormley, *The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations from the Jurisdiction of American Courts*, 32 Univ. of Cincinnati L. Rev. 131 (1963).

domicile in Maryland, it would be retained until a new domicile was clearly adopted. Two Maryland cases have so held. *Comptroller v. Lenderking*, 268 Md. 613, 303 A.2d 402 (1973) (Foreign Service Officer did not lose Maryland domicile by going to Japan on temporary assignment and then returning to live with friends in Virginia); *Knapp v. Comptroller*, 269 Md. 697, 309 A.2d 635 (1973) (taxpayer established residence in Pennsylvania for business purposes but returned often to Maryland where many indicia showed his domicile remained).

Moreover, contrary to the petitioner's contention, the fact that the respondents and their fathers hold G-4 non-immigrant visas does not necessarily preclude them from having the requisite intent, and demonstrating sufficient indicia thereof, to establish domicile in Maryland. Visa status as such has nothing to do with whether an alien may or may not be planning to stay indefinitely in the United States. The period of validity for a non-immigrant visa relates *only* to the period during which an alien may apply for *admission* to this country, and such periods are determined by reciprocal agreements with other countries. 22 C.F.R. §41.122(b) and (c). This period of validity for *admission*, by the terms of the relevant federal regulations, "*shall have no relation* to the period of time the alien may be authorized by the immigration authorities to *stay* in the United States . . . ." 22 C.F.R. §41.122(a) (emphasis added). As the District of Columbia Court of Appeals stated, in holding that a British citizen employed by the International Monetary Fund and residing in the District of Columbia had established domicile there:

> "*A visa is a document of entry* required of aliens by the United States Government and is a matter under the control of the Government. *It has little relevance to the question of domicile.* The fact that appellee entered the United States on a nonimmigrant visa to work for the I.M.F. does not preclude a finding that appellee could become domiciled in the District of Columbia." *Alves v. Alves*, 262 A.2d 111, 115 (D.C. App. 1970) (emphasis added).

It is clear from the statutory provisions under which a G-4 visa is issued that it does not, by its terms, preclude establishing the requisite intent for domicile in Maryland or any other State. On the contrary, analysis of the relevant provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, shows that those who hold G-4 visas are among the few non-immigrants whom Congress specifically chose to exempt from the requirement that they maintain a foreign domicile or that they enter the United States for a specific temporary purpose.

The twelve major categories of non-immigrant aliens are listed at 8 U.S.C. §§1101(a)(15)(A)-(L). For most of these categories, Congress either has required explicitly that aliens in that category maintain a domicile overseas or has approved their entry for only a specific temporary purpose. These include: temporary visitors for business or pleasure "having a residence in a foreign country which [they have] no intention of abandoning," §1101(a)(15)(B); aliens "in immediate and continuous transit," §1101(a)(15)(C); alien crewmen who intend to land "temporarily and solely in pursuit of [their] calling," §1101(a)(15)(D); foreign students "having a residence in a foreign country which [they

have] no intention of abandoning," §1101(a)(15)(F); aliens coming to perform services of an exceptional nature, to perform temporary work, or to be trained, "having a residence in a foreign country which [they have] no intention of abandoning," §1101(a)(15)(H); certain students and teachers on State Department programs, "having a residence in a foreign country which [they have] no intention of abandoning," §1101(a)(15)(J); fiances and fiancees of American citizens coming "solely to conclude a valid marriage with the petitioner[s] within ninety days after entry," §1101(a)(15)(K);[24] and corporate employees "who seek to enter the United States temporarily in order to continue to render [their] services to the same employer[s] . . . ," §1101(a)(15)(L).

Subsection (G)(iv), however, provides, in its entirety, that the category of aliens included therein are:

> "[O]fficers, or employees of such [previously indicated] international organizations, and the members of their immediate families," §1101(a)(15)(G)(iv).

Thus, G-4 visaholders – along with a few other limited categories of non-immigrant visaholders, such as those who enter under certain treaties of commerce (§1101(a)(15)(E)) and certain foreign media representatives (§1101(a)(15)(I)) – were particularly exempted by Congress from the requirement either that they maintain foreign domicile or that they enter the United States for only a temporary purpose – requirements

[24]Of course, the accomplishment of this particular temporary purpose will often lead to a later establishment of immigrant status.

placed upon other non-immigrant categories. If Congress had intended to place such domiciliary restrictions on these visaholders, it would have been a simple matter to have included in the relevant subsections language similar to that included, *inter alia*, in the other subsections, discussed above. Or if Congress had intended to establish a general rule against the establishment of domicile in the United States by all non-immigrants, it could easily have said so. Instead, it drafted each statutory provision dealing with each category of non-immigrants in such a way that some non-immigrants were under domiciliary restrictions and some, including those holding G-4 visas, were not. "Immigrants" or "permanent residents" was made a residual category under the statute, consisting of all those who were not admitted under one of the specific non-immigrant visas. There is no evidence whatever that Congress intended that only those aliens in that "immigrant" category should be admitted on terms which would permit the establishment of a domicile in this country. Indeed, the structure of the statute strongly suggests that Congress intended such freedom for a few selected categories of non-immigrants as well, including those admitted under subsection G(iv).[25]

[25]This reasoning is supported by *Gosschalk v. Gosschalk*, 48 N.J.Super. 566, 138 A.2d 774, *aff'd*, 28 N.J. 73, 145 A.2d 327 (1958). In that case, an alien held a temporary visitor's visa under 8 U.S.C. §1101(a)(15)(B), which was extended periodically so that he could remain for trading purposes; it was recognized that he would have been eligible for "treaty trader" status under subparagraph (E) of 8 U.S.C. §1101(a)(15) if the appropriate treaty between the U.S. and the Netherlands had been in force. As noted above, this latter status is similar to that of a G-4 visaholder in that it is one of the few non-immigrant visas which does not require the visaholder to maintain a foreign

[continued]

The petitioner, in arguing to the contrary, relies upon a general regulation of the Immigration and Naturalization Service (8 C.F.R. §214.1) (Pet. Br. 35). Among other things, this regulation requires all non-immigrant aliens to agree to abide by the terms and conditions of admission and to "depart" when their period of admission expires or when they abandon their non-immigrant status. The petitioner seeks to interpret the word "depart" in this regulation wholly out of context in such a way as to imply that the holding of a G-4 visa is incompatible with an intent to reside indefinitely in Maryland. Under 8 C.F.R. §214.2(g), aliens holding G-4 visas are admitted to the United States for such period of time as they are recognized by the Secretary of State, which is normally for the duration of their employment. As we have noted (pp. 7-8, *supra*), if such aliens develop an intent to remain here for the indefinite future, there are good reasons why they may have to wait until their retirement arrives or approaches in order to change their status to that of immigrant. In the past, an alien who wished to change his visa status to that of an immigrant upon retirement may or may not have been required to "depart" the United States in order to do so. 1 Gordon & Rosenfield, Immigration and Procedure, §2.6 at 2-37, §7.7 (1975). Under recent amendments to the Immigration Act, they need

(footnote continued from preceding page)
domicile or to be visiting the United States temporarily. The court noted that it was only if the alien's presence in the United States were illegal that he would not be able to establish a domicile here, and it cautioned that domicile should not be confused with capacity for naturalization. 138 A.2d at 779.

not depart at all.[25] But even under the prior Act, under which natives of a Western Hemisphere nation might be required to "depart" in order to change their status, such temporary "departure" in no way necessarily negates an intent to continue to reside in this country. It is self-evident that a person who is domiciled in one place may still travel temporarily to another without abandoning his domicile.

Before concluding this discussion of why the University's permanent irrebuttable presumption of non-domicile for G-4 visaholders is not universally true, we deal briefly with the limited authorities again offered by the petitioner on this issue, despite the trial judge's rejection of those authorities (Pet. App. 38a-40a). Petitioner's reliance here is on Revenue Ruling 74-364, 1974-2 C.B. 321, and *Seren v. Douglas*, 30 Colo. App. 110, 489 P.2d 601 (1971) (Pet. Br. 37), Neither suffices.

The Revenue Ruling held that the holder of a G-4 visa was not domiciled in the United States for federal estate tax purposes. It was based on the above-discussed requirement that he "depart" at the expiration of the period of his admission. As shown above, however, and as the district court held, "under federal law a G-4 alien is capable of remaining in Maryland indefinitely and, therefore, has the legal capability to have the necessary intent to establish a Maryland domicile," and hence "[a]s an explication of the *law of domicile*, . . . the Revenue Ruling is in error" (Pet. App. 38a-39a). Moreover, the concepts of domicile and residency for

[26]P.L. 94-571, 94th Cong., 2d Sess. (Oct. 20, 1976), §7(g), 90 Stat. 2706.

tax purposes are notoriously variable. In that connection, the United States Tax Court has recently held that an employee of the IDB – a citizen of Chile and a holder of a G-4 visa, who had resided in the United States since 1966 – was a resident alien for tax purposes and therefore entitled to file a joint income tax return with his wife claiming their children and his wife's mother as dependents. *Escobar v. Commissioner*, 68 T.C. 304 (1977). The Tax Court there noted that, even assuming that the stay of G-4 visaholders in the United States was limited by the immigration laws to a definite period, those aliens could nevertheless be residents of the United States for income tax purposes. See also *Brittingham v. Commissioner*, 66 T.C. 373, 414 (1976), stating that "the immigration status of an alien does not conclusively determine whether [he] is a resident of the United States."

Furthermore, the Revenue Ruling relied, as does the petitioner, on *Seren v. Douglas, supra*, a case that does not support their position regarding G-4 aliens. That case involved a foreign student holding a non-immigrant F-1 visa, which classified him as an alien with "a residence in a foreign country which he has no intention of abandoning . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . . ." The court held that he was precluded from establishing state domicile so as to qualify for in-state rates at a state university, since the terms of his visa "bound him to not abandon his homeland." 489 P.2d at 603 [27]. The court also

[27]The passage which the petitioner has quoted from *Nyquist v. Mauclet, supra*, 53 L.Ed.2d at 68 (Pet. Br. 38), makes a similar point about F-1 visaholders, but likewise says nothing about G-4 visaholders.

recognized, however, that "that disability could, as a matter of fact and law, have dissolved upon expiration of his student visa . . . . [at which] time he could abandon his legal intent to return to his homeland . . . ." *Id.* A G-4 visaholder, of course, is not bound by the terms of his visa "to not abandon his homeland," and hence the *Seren* decision does not support the conclusion that a G-4 alien cannot establish domicile in this country.

In short, as the district court found, there is nothing in the law of domicile or in the federal immigration laws which requires the conclusion that the holding of a G-4 visa either explicitly or implicitly erects any barrier to the establishment of a domicile in Maryland. To the contrary, a G-4 visaholder may in fact have the requisite domiciliary intent. Thus, the University's irrebuttable presumption of non-domicile for such visaholders is not necessarily or universally true in fact. Under *Vlandis*, therefore, since the University purports to be concerned with domicile in its admission policy and in allocating rates for its tuition and fees, the presumption concluding the inquiry into that crucial factor for G-4 aliens denies them due process of law.

B. The Due Process Principle Applied in *Vlandis v. Kline* Has Been and Should Continue To Be Preserved as Applicable to Cases Like *Vlandis* and the Present Case.

The petitioner and the *amici curiae* supporting him argue that *Vlandis* has been so eroded by subsequent decisions of this Court that it should be overruled. It is true that a broad reading and application of the

rationale in *Vlandis* – which, as the petitioner (Pet. Br. 21) and *amici* (Am. Br. 5) state, some lower courts had adopted after the *Vlandis* decision – were cut back by subsequent decisions of this Court and were criticized by some academic commentators. But we need not and do not advocate such a broad reading here. As discussed above, this case is virtually identical to *Vlandis.* And this Court, lower courts, and commentators have recognized that the *Vlandis* doctrine, as limited in accordance with subsequent decisions to its core due process principle and as applied to cases with facts like those in *Vlandis* and the present case, falls plainly within the scope of procedural due process.

As we shall show, this Court's decisions and sound constitutional principles reveal that the due process rationale of *Vlandis* has and should have continued vitality when applied as follows: Where the State, through a statute or administrative rule, makes a certain fact crucial to the entitlement to or enjoyment of property or liberty, it may not preclude individuals who seek to meet that factual test, and who are not in a class universally unable to do so, from proving that they do meet that test, unless the difficulties in determining the crucial fact through such an individualized hearing procedure would outweigh the individuals' interests affected. We now discuss the precedential and constitutional underpinnings of this principle and its application here.

1. Where the State Makes a Particular Fact Crucial, Its Use of a Conclusive Presumption To Deny to a Certain Class of People the Opportunity to Prove That Fact Denies Procedural Due Process Unless That Presumption Is Universally True or Unless the State's Difficulties in Holding Individual Hearings Outweigh the Individual Interests Affected.

In *Weinberger v. Salfi,* 422 U.S. 749 (1975), this Court, speaking through Mr. Justice Rehnquist, upheld the provision of the Social Security Act which defines "widow" and "child" so as to exclude surviving wives and stepchildren from survivors benefits when those wives and stepchildren had their respective relationships to a deceased wage earner for less than nine months prior to his death. The Court distinguished, but did not overrule, *Vlandis* as follows:[28]

> "In *Vlandis v. Kline,* a statutory definition of 'residents' for purposes of fixing tuition to be paid by students in a state university system was held invalid. *The Court held that where Connecticut*

[28]The Court in *Salfi* also distinguished and preserved two other cases holding irrebuttable presumptions unconstitutional – *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). The Court stated that, unlike the claims involved in those cases, a non-contractual claim to receive funds from the federal treasury enjoys no constitutionally protected status, although, of course, there may not be invidious discrimination among such claims. 422 U.S. at 771-72. Subsequent to *Salfi*, this Court again reaffirmed *La Fleur* by striking down an irrebuttable presumption "virtually identical" to that held invalid in *La Fleur. Turner v. Dept. of Employment Security*, 423 U.S. 44, 46 (1975). In the present case, as we have shown, the University's conclusive presumption is "virtually identical" to that struck down in *Vlandis.*

purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue.

* * *

"Unlike the statutory scheme in *Vlandis* . . . , *the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible.* . . . [T]he benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. . . . [A]ppellees are completely free to present evidence that they meet the specified requirements . . . ." 422 U.S. at 771, 772 (emphasis added).[29]

[29]In making the last two statements, the Court analogized the case before it to *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). As discussed above, the lower court in that case had upheld the validity of a state university's one-year residency requirement for in-state status, which students could meet while in student status and after which time the students could present evidence of in-state residence. As the Court in *Salfi* recognized, that policy made the in-state rates available upon compliance with an objective criterion, evidence of which the students were free to present, rather than making the in-state rates available upon compliance with a certain factual test (residency) and then precluding certain students from presenting, and having considered, evidence that they met that test. Moreover, as shown on pp. 20-21 above, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status, whereas the statute in *Vlandis* prohibited the students involved from ever rebutting the presumption of non-residence during the entire time they remained in student status. The University's policy here likewise prohibits G-4 aliens from ever rebutting the presumption of non-domicile during the entire time they remain in G-4 status.

The Court thus made clear the distinction between statutes that condition benefits upon compliance with an objective criterion on which individuals can present evidence, and statutes that condition benefits upon a factual test that is deemed to be crucial – such as residency in *Vlandis*, fitness as a parent in *Stanley v. Illinois*, 405 U.S. 645 (1972), and fault in driving in *Bell v. Burson*, 402 U.S. 535 (1971) – and then preclude individuals from presenting relevant evidence that they meet that test and having that evidence considered.

The Court had suggested the same distinction in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), cited by the Court in *Salfi*. See 422 U.S. at 774. That case involved a regulation that required certain disclosures whenever credit was offered to a consumer " 'for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.' " 411 U.S. at 362. That regulation was attacked under the Due Process Clause as constituting a conclusive presumption that payments made under an agreement providing for more than four installments necessarily included a finance charge, when that might not in fact be true. The Court rejected that attack stating:

> "The challenged rule contains no [conclusive] presumption. The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." *Id.* at 377.

As thus drawn by the Court, the line of distinction resembles closely the traditional line which marks off, on the one side, departures from procedural due process and, on the other side, the now judicially discredited challenges to legislative or administrative choices which before 1937 often had prevailed under the guise of substantive due process. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Mr. Justice Rehnquist's language in dissent in *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 524 (1973), points up the constitutional difference between irrebuttable presumptions which impinge upon procedural due process and valid legislative limitations operating for the protection of the public in areas of economic regulation:

> "There is a qualitative difference between, on the one hand, holding unconstitutional on procedural due process grounds presumptions which conclude factual inquiries without a hearing on such questions as fault, *Bell v. Burson*, 402 U.S. 535 (1971), the fitness of an unwed father to be a parent, *Stanley v. Illinois*, 405 U.S. 645 (1972), or, accepting the majority's characterization in *Vlandis v. Kline*, 412 U.S. 441 (1973), residency, and, on the other hand, holding unconstitutional a duly enacted prophylactic limitation on the dispensation of funds which is designed to cure systemic abuses."

As these authorities make clear, an enactment that constitutes a conclusive presumption for due process purposes is one that purports to be concerned with a particular fact and makes benefits or detriments turn on that fact and then concludes the inquiry into that fact for a certain class of people by erecting a presumption

that they cannot meet that factual test and denying them any opportunity to show the contrary. Such a conclusive presumption implicates compelling considerations of fairness and procedural due process.

Of course, as *Salfi* indicates, it must be clear, before such an irrebuttable presumption is found, that the legislature has not simply adopted an objective prophylactic limitation on the dispensation of funds, but that the legislative concern is really with a certain fact and that it presumes that ultimate fact from the proximate fact, itself irrelevant to the legislative concern, that a person is in a particular class. This determination is normally made by looking at the language of the challenged enactment itself. Thus, in *Vlandis*, the statute itself made entitlement to the lower tuition and fee rates turn on whether the person was a Connecticut resident or nonresident, but it then conclusively presumed that all persons who had a legal address outside of Connecticut when they applied to the University were nonresidents. The same was true in *Bell v. Burson, supra*, which held that a statutory requirement that an uninsured motorist who was involved in an accident and could not post adequate security must have his driver's license suspended without a hearing on the question of fault was an unconstitutional irrebuttable presumption. That decision was based on the fact that the statutory scheme itself made clear that the State deemed fault a crucial factor in the deprivation of drivers' licenses. See 402 U.S. at 541.

In other cases, even where the existence of a conclusive presumption is not clear from the face of the enactment, it may be otherwise manifest and indisput-

able – *e.g.*, from the legislative history or the briefs in the case – that the enactment does constitute such a presumption. In *Stanley*, for example, the Court found a conclusive presumption both by looking generally at the statute and because the State itself defended the statute as a procedural device whereby "all . . . unmarried fathers can reasonably be presumed to be unqualified to raise their children." 405 U.S. at 653.[30]

Generally speaking, however, application of the *Vlandis* doctrine does not mean that courts should go searching for a presumption behind the language of every legislative enactment. In the words of the Court in *Salfi*, "[t]his would represent a degree of judicial involvement in the legislative function which we have eschewed except in the most unusual circumstances" and would turn the irrebuttable presumption doctrine into a "virtual engine of destruction for countless legislative judgments . . . ." 422 U.S. at 773, 772. Indeed, it would be difficult for a court to determine, unless the enactment so provides or unless it is otherwise obvious, whether there is behind the enactment an ultimate fact that the State deems crucial and, if so, what that fact is. This is demonstrated, for instance, by mandatory retirement statutes, such as that upheld in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). A requirement that a person retire at a particular age is not necessarily a conclusive presumption of unfitness for work at that age. It might also be based on a purpose to remove persons from work in the least humiliating and embarrassing way, on

[30]See also *Cleveland Board of Education v. La Fleur, supra*, 414 U.S. at 643-46.

the need to boost the morale of younger workers, or on the need to artificially reduce the work force to make room for other individuals.[31] Likewise, in *Salfi*, the

[31]Professor Jonathan B. Chase of the University of Colorado discusses this point in an article which, as noted on p. 65 below, supports the use of the irrebuttable presumption doctrine in carefully circumscribed circumstances:

> "Could it not be argued successfully that the purpose [of a mandatory retirement statute] is not only to remove from the work force persons who are no longer able to perform, but also to do so in a way least likely to cause offense, embarassment or humiliation? That is, the purpose, in part, is to avoid the pain of individualized determinations of incapacity. Such a purpose would avoid irrebuttable presumption analysis since it does not presume anything other than the fact that the negative psychological impact on persons found by means of individualized determinations to be too old to continue in employment outweighs any benefit to be enjoyed by those individuals still capable of continuing in employment beyond a particular age, assuming that the age chosen is rational. The only overclassification present in such a determination is that there are some people on whom such a finding of incapacity would have no negative psychological impact. It is, however, extremely unlikely that any hearing could be devised which would accurately disclose who such persons were.
>
> "Another possible purpose for a mandatory retirement age has nothing whatever to do with ability to work but relates solely to the need to artificially reduce the work force. Given the fact that there are more people than jobs, it would be arguably rational for the state to artificially decrease the work force and, at the same time, open up more jobs by removing from the job market all persons beyond a particular age. Again, such a purpose presumes nothing, it denies no one a hearing on any fact the legislature has made ultimate. It is thus suggested that the 'new' procedural due process analysis does not necessarily mandate the result forebodingly foreseen by Justice Rehnquist in *La Fleur* [414 U.S. at 659]." *The Premature Demise of Irrebuttable Presumptions*, 47 Colo. L. Rev. 653, 691-92 (1976).

duration-of-relationship rule was not necessarily based on a conclusive presumption regarding sham marriages and on a desire to bar claims arising from them. As the Court recognized, that rule also protected "large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages." 422 U.S. at 782. Further, the very existence of the rule could reasonably have been expected to discourage sham marriages. *Id.* at 784-85. Finally, the rule could have served the interest in providing benefits only for persons who are likely to have become dependent upon the wage earner. See *id.* at 776 n. 11. Because of the dangers inherent in such speculation as to the purposes of or motives for an enactment and the consequent risk of undue judicial interference in legislative affairs, a conclusive presumption, where not apparent on the face of an enactment, should not easily be found.

These considerations, however, do not apply where a conclusive presumption is clear on the face of the challenged enactment or is otherwise obvious and not reasonably in doubt. That is the situation in the present case. A look at the University's policy for classifying students as "in-state" or "out-of-state" for purposes of admission, tuition, and fees reveals that the crucial fact is whether the student, or his parent if he is financially dependent, is domiciled in Maryland; and it shows that G-4s and other non-immigrant aliens are totally and uniquely precluded from proving that they meet that test. Moreover, the petitioner himself has repeatedly taken the position that the University "bases its award of in-state status on domicile" (Pet. Br. 11) and that G-4s and other non-immigrant visaholders are denied

that status because they are conclusively presumed to be unable to "have the requisite legal intent to establish Maryland domicile" (*id.*). This position is repeated at Pet. Br. 12, 34, and 35. The District Court, too, found that domicile was the crucial fact under the University's policy (Pet. App. 32a, 41a). Thus, there can be no doubt that the University's policy constitutes a conclusive presumption of the ultimate fact of concern – domicile – from the separate fact that a person is in a certain class – that of non-immigrant aliens.

Such a conclusive presumption, of course, could be justified if it were universally true in fact. As we have shown, however, the University's conclusive presumption of non-domicile is not universally true in fact for G-4 aliens. In such a case, the State's use of the irrebuttable presumption to conclude the inquiry into the fact that the State has made crucial – rather than providing individuals seeking to prove that fact with a hearing at which they could attempt to do so – creates a serious problem of procedural due process.[32] It

[32]The petitioner argues that the respondents have not demonstrated the requisite "property" or "liberty" interests to invoke the Due Process Clause (Pet. Br. 26-27 n. 14). With respect to property, he relies on this Court's decisions that property interests are created and defined by reference to state law, *Bishop v. Wood*, 426 U.S. 341 (1976), *Board of Regents v. Roth*, 408 U.S. 564 (1972), and on the fact that the University's policy here expressly precludes non-immigrants from obtaining in-state status. His argument is wholly without merit. The "property" interests needed to invoke the due process guarantee include the concept of "entitlements," representing expectation of interests to which persons have a claim under the enactments involved and which may not be revoked or withheld without complying with procedural due process. Thus, even where

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government has no obligation to extend benefits, this Court has held that, where it has done so, it must observe due process restraints before terminating those benefits, as in *Goldberg v Kelly*, 397 U.S. 254 (1970), *Bell v. Burson*, 402 U.S. 535 (1971), and *Goss v. Lopez*, 419 U.S. 565 (1975), and in conditioning eligibility for those benefits, as in *Vlandis v. Kline*, *supra*, *United States Department of Agriculture v. Murry*, *supra*, and *Jimenez v. Weinberger*, 417 U.S. 628 (1974); see also *Flemming v. Nestor*, 363 U.S. 603, 611 (1960). While this Court has indicated that such entitlements are defined by reference to state law, that does not mean that state enactments denying or withholding benefits from particular claimants must necessarily be read as precluding those claimants from having "property" interests for due process purposes. The enactments in all the irrebuttable presumption cases were of this type. Yet it is the very point of the irrebuttable presumption analysis that the State has determined that all those who meet a particular factual test are entitled to benefits, and then denies to a class of people who are not universally unable in fact to meet that test the opportunity to prove that they do so. In such a case, the State has itself created an entitlement to the benefits for those who can show the ultimate fact and it has then deprived certain people of that entitlement. This situation is similar to that in *Arnett v. Kennedy*, 416 U.S. 134 (1974). There the Court held that an employee who had a statutory right not to be discharged without cause had a property right for due process purposes, even though the same statute also expressly permitted his discharge without the procedures he claimed were constitutionally required. So too here, all persons who can show the fact deemed crucial under the State's enactment have an entitlement to benefits and thus a property interest, even though the same enactment also expressly prevents certain people who could prove that fact from having the opportunity to do so. Thus, in the present case, as in *Vlandis*, the respondents, if able to show Maryland domicile, have a property right in the form of an entitlement to in-state status.

The petitioner's reliance on *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n. 15 (1974), for the proposition that the respondents have no "liberty" interest is also misplaced.

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requires the reviewing court to scrutinize carefully the State's interest in using an irrebuttable presumption instead of making individual determinations of the crucial fact, and to weigh that interest against the individuals' interests burdened by the presumption.

Where the individual has an important, even if not constitutionally protected, interest, and the State would not have great difficulty in determining the crucial fact through an individualized hearing procedure, the presumption cannot stand. Mr. Justice Marshall made this point clearly in his concurring opinion in *United States Dept. of Agriculture v. Murry*, *supra*, 413 U.S. at 518:

> "[W]here the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices."

Thus, for example, in *Vlandis* the private interest burdened by the irrebuttable presumption was the interest in securing a public education – an interest which, while not a constitutional right, has nonetheless

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The Court there was discussing whether a *one-year durational* residency requirement for in-state status penalized the *right to travel* for purposes of determining the proper *equal protection* test. That discussion is not relevant to our position that a *permanent irrebuttable presumption* of non-domicile for determining in-state admission and tuition status burdens, for *due process* purposes, the "liberty" interest which those who may be domiciled in State but are not allowed to show it have in securing a public higher education in their home State.

been recognized by this Court as of extreme and vital importance in our society. See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 29-30 (1973); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). And, as the *Vlandis* Court recognized, the State would not have had substantial difficulties in holding individualized hearings to determine the bona fide residence of students who had applied from out of State. 412 U.S. at 453-54. Similarly, in *Stanley*, the Court contrasted the "important interests of both parent and child" which were involved, with the fact that "the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal." 405 U.S. at 657.[33]

On the other hand, where purely economic matters are at stake and where the State would have substantial difficulties in determining the ultimate fact through individualized hearings, conclusive presumptions are justifiable. The State's difficulties could arise either from the large number of individualized hearings that would be required or from the lack of any alternative means that is clearly better than the conclusive presumption for determining the ultimate fact. For example, in cases challenging some part of a major social welfare or governmental insurance program, such

[33]See also *Bell v. Burson*, *supra*, 402 U.S. at 540 ("Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement"); *United States Dept. of Agriculture v. Murry*, *supra*, 413 U.S. at 517 n. 2 ("The Congress has alternate means available to it by which its purpose can be achieved"); *Cleveland Board of Education v. La Fleur*, *supra*, 414 U.S. at 647 n. 14 ("The school boards have available to them reasonable alternative methods of keeping physically unfit teachers out of the classroom").

as the Social Security System, the administrative burdens that would be created by a requirement to grant individualized hearings to all claimants would in most instances be intolerable and justify the use of a broad conclusive presumption to limit the dispensation of funds. Thus, in *Salfi*, the Court relied in part on the "large numbers" of people involved – the "millions of beneficiaries" – and the consequent "administrative difficulties of individual eligibility determinations." 422 U.S. at 781, 784. See also *Califano v. Jobst*, 46 U.S.L.W. 4004, 4006 (Nov. 8, 1977). The potentially overwhelming administrative burden that would otherwise result should also justify age requirements for drinking, voting, driving, etc., even if such requirements were thought to embody conclusive presumptions. Furthermore, the use of an irrebuttable presumption may be justified if there is no other readily available and more reliable way, or no recognizable standards, to measure the ultimate fact. Again in *Salfi*, the Court stated:

> "Nor is it at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expectancy, nor knowledge of terminal illness has been shown . . . to be reliably determinable." 422 U.S. at 782-83.

When the conclusive presumption cannot be justified by such administrative necessities outweighing the individuals' interests, the State's use of the conclusive presumption is wholly unfair, and a procedure for individualized determinations of the fact deemed crucial is required by the Due Process Clause. In the present case, the University's conclusive presumption of non-

domicile for G-4 aliens cannot be so justified. As in *Vlandis*, that policy burdens the G-4 students' interest in securing a public education -- an interest of vital societal importance.[34] By contrast, the University's difficulties in making individual determinations of whether G-4 aliens are in fact domiciled in Maryland are minimal. As discussed on pp. 25-27, *supra*, the University already has a hearing procedure for determining in-state status. It uses that procedure to inquire into the domicile of citizens and immigrant aliens. Indeed, it also uses the same procedures in the cases of G-4 and other non-immigrant aliens to consider such matters as changes in immigration status, but not domicile (Pet. Br. 32). It would take little, if any, extra time for the University also to consider domicile for G-4 and similarly situated non-immigrant aliens. As we have stated, there would appear to be relatively few such aliens with G-4 visas or other visas which would allow establishment of Maryland domicile. And, of course, as the Court recognized in *Vlandis*, 412 U.S. at 454, there is a more reliable way than a conclusive presumption, and there are recognizable standards, for determining domicile – namely, through examination of the factors that the University now examines for citizens and immigrant aliens. In short, we submit that in none of the other cases we have discussed was it so easy to make individualized determinations of the fact deemed

[34] As discussed in Part II of this Brief, the University's policy also creates a classification based on alienage and thus, for equal protection purposes, is subject to "strict scrutiny" regardless of the importance of the individuals' interest at stake. For equal protection analysis, then, the balancing test discussed here would not be necessary.

crucial as it is here.[35] In these circumstances, the Due Process Clause clearly requires the making of such individual determinations rather than the use of the unfair conclusive presumption.

2. Application of the *Vlandis* Doctrine Under the Above Analysis Is Consistent with the Decisions Cited by Petitioner.

This Court's decisions cited by the petitioner (Pet. Br. 23-25) and his supporting amici (Am. Br. 6) are wholly consistent with the analysis we have suggested for applying the due process principles of *Vlandis*.

In *Salfi* itself, as we have discussed, the Court pointed out that the challenged statute did not constitute an irrebuttable presumption at all, but established a flat objective criterion on which individuals could present evidence. Even if that statute could be said, by virtue of the main purpose expressed in its legislative history, to embody a conclusive presumption, it would nonetheless be justified, as also discussed above, on the grounds that it regulated only economic interests and that requiring individualized hearings would create an overwhelming administrative burden and would not even be a clearly more reliable way to determine the fact of concern.

In *Murgia*, the mandatory retirement statute involved – requiring that police officers retire at the age of 50 – was a flat objective requirement, for which several

[35] Apart from the alleged administrative difficulties, the other interests asserted by the petitioner to support the University's policy are shown on pp. 22-29, *supra*, to be insufficient to do so.

reasons were possible (see pp. 48-49, *supra*), rather than an irrebuttable presumption purporting to be concerned with a particular fact and then concluding the inquiry into that fact. Understandably, then, this Court did not make an irrebuttable presumption analysis, but employed traditional equal protection principles.

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976), the challenged federal statute prescribed two methods for showing "total disability" from black lung disease – for which compensation was provided. The first defined "totally disabled." The second provided that if a miner had complicated and incurable black lung disease, he was deemed to be totally disabled for purposes of entitlement to compensation. The lower court had held the latter to be an unconstitutional irrebuttable presumption, and this Court reversed. As this Court pointed out, while the challenged provision was in the form of an irrebuttable presumption, it was not an irrebuttable presumption in the mold of those in *Vlandis* and *Stanley*. Id. at 22. In those cases, as discussed above, the legislature's concern was with a particular ultimate fact and it then presumed that fact from the proximate fact, itself irrelevant to the legislative concern, that a person was in a certain class or had a certain trait. The provision involved in *Usery* was of a different type, for the Congress was not only concerned with the ultimate fact presumed – total disability from black lung disease – but was equally concerned with the proximate fact or trait – complicated and incurable black lung disease. As the Court stated, the effect of the challenged provision was to provide compensation for complicated black lung disease, and "it was precisely this advanced and

progressive stage of the disease that Congress sought most certainly to compensate." *Id.* at 23. The provision in *Usery*, then, did not involve a conclusive presumption that implicated procedural due process. In any event, the Court limited its holding to enactments "regulating purely economic matters," *id.* at 24; and in such cases, as we have shown, weighing the individuals' interests against the State's difficulties in holding individualized hearings will very often result in a finding that the conclusive presumption is justified.

In *Knebel v. Hein*, 429 U.S. 288 (1977), the challenged federal food stamp regulations provided that a travel allowance in connection with job training would be included in income for food stamp purposes. The lower court had gone behind the face of the regulations and had found that they reflected a conclusive presumption that receipt of the travel allowance increased the trainee's food purchasing power and decreased her need. 402 F. Supp. 398, 407 (S.D. Iowa 1975). This Court rightly refused to engage in such a search for irrebuttable presumptions. It held:

> "Nor do the regulations embody any conclusive presumption. They merely represent two reasonable judgments: First, that recipients of state travel allowances should be treated like other trainees and like wage earners; and second, that the standard 10% deduction, coupled with the 30% ceiling on coupon purchase prices, provides an acceptable mechanism for dealing with ordinary expenses such as commuting." 429 U.S. at 297.

Similarly, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the challenged sections of the federal immigration laws did not constitute a conclusive presumption purporting to be concerned with a particular factual question and

then concluding the inquiry into that fact. Rather, they simply excluded the relationship between an illegitimate child and his natural father from the special immigration status accorded children or parents of American citizens or permanent resident aliens. In any event, the Court based its decision to uphold those sections on the Congress' traditional plenary power over immigration, which is "largely immune from judicial control." 430 U.S. at 792.

Again, in *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of subst. federal question*, 430 U.S. 961 (1977), the challenged enactment, which prohibited voting by aliens in school elections, was a flat, objective prohibition, not a conclusive presumption. As the court explained:

> "The statutes do not create an irrebuttable presumption. There is no fact presumed from the status of alienage; rather the legislature intended to prohibit aliens from voting, and the classification exactly achieves that purpose. The statutes do not purport to be concerned with prohibiting from voting persons with some common trait, which trait is conclusively presumed from the status of alienage. Instead the statutes only purport to exclude aliens from voting. Thus, they do not create a conclusive presumption." 553 P.2d at 833.[36]

[36] The other lower court decisions cited by the petitioner (Pet. Br. 25 n. 12) likewise involved flat, objective requirements, rather than irrebuttable presumptions of the type involved in *Vlandis*. Thus, in *Mogle v. Siever County School Dist.*, 540 F.2d 478, 484-85 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), in upholding a residency requirement for teachers, the court explained:

> "In [*Vlandis*], in effect, a fact question was identified
>
> *(continued)*

Finally, in *Califano v. Jobst*, 46 U.S.L.W. 4004, 4006 (Nov. 8, 1977), this Court indicated that there is no question about the power of Congress to condition social security benefits on simple criteria such as age and marital status. While the Court indicated that such criteria were premised on a congressional assumption about probable dependency, we do not read the Court's statement to mean that the flat social security eligibility criteria of age and marital status constitute irrebuttable presumptions of the *Vlandis* type. Even if they did, however, such criteria would nonetheless be justified under a balancing of competing interests. As the Court stated, "[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency . . . ." *Id.*

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and then decided by a conclusive presumption. . . .

> "In our case, the residency requirement does not involve such identification of a controlling fact question and decision of it by an irrebuttable presumption. There are numerous factors that may undergird the policy and the line drawn by the Board. It is not shown that application of the policy to this plaintiff involves a presumption against him on any particular point. In such a case, we do not feel the conclusive presumption doctrine was intended to apply."

The same was true of the prison policy in *Sellers v. Ciccone*, 530 F.2d 199 (8th Cir. 1976), which required long-term inmates to be within ten years of a release date in order to be eligible for a certain training program, and of the social security provision in *Fisher v. Secretary of HEW*, 522 F.2d 493 (7th Cir. 1975), which conditioned benefits for domestic workers on their having minimum earnings from a single employer for a certain number of quarters.

3. Application of the *Vlandis* Doctrine Under the Above Analysis Is a Principled Constitutional Interpretation.

While the above decisions admittedly put limits on the irrebuttable presumption doctrine of *Vlandis*, they are wholly consistent with the analysis we have suggested for applying that doctrine. That analysis, we submit, represents the proper interpretation of the Due Process Clause. Where the State makes clear its concern with a particular fact and makes that fact crucial to the entitlement to property or enjoyment of liberty, its denial to a certain class of people of the opportunity to prove that they meet that factual test, on the basis of a conclusive presumption that is not universally true in fact, is plainly unfair and implicates established and fundamental procedural due process concerns. Of course, as discussed above, there are sound policy and constitutional reasons not to search for such conclusive presumptions in all legislative enactments by looking behind the language of the enactments to the possible purposes for them. To do so would constitute undue judicial intervention into the legislative function and would, in the language of *Salfi*, turn the irrebuttable presumption doctrine into "a virtual engine of destruction for countless legislative judgments . . . ." 422 U.S. at 772. But where it is clear from the face of the enactment or is otherwise obvious that the enactment has made a certain fact crucial and then has conclusively presumed the existence of that fact from another fact, which is not otherwise the subject of the legislative concern, then principles of procedural due process require a careful scrutiny of the enactment. Such a conclusive presumption can be justified only if

the State's difficulties in determining the crucial fact through individualized hearings would be substantial and would outweigh the individuals' interests affected. Otherwise, the denial of an individualized hearing on the fact deemed crucial is a denial of due process.

This analysis is not a resurrection of the substantive due process concepts of the early part of this century, which have been in large part repudiated by this Court. For as the Court recognized in *Stanley v. Illinois*, 405 U.S. at 652, our analysis scrutinizes means, not ends. It does not in any way prohibit or limit the State's ability to pursue certain stated objectives. Rather, it simply focuses on the means the State uses to achieve its objective and ensures that when the State conditions benefits or detriments on a particular fact, it does not without very good reason deny people's right to introduce, and to have duly considered, relevant evidence regarding that fact.

Various members of this Court have, at one time or another, recognized the basic due process principle inherent in the above analysis, although they would give that principle varying degrees of breadth in application. See, *e.g.*, Mr. Justice Brennan's dissenting opinion, joined by Mr. Justice Marshall, in *Salfi*, 422 U.S. at 804-05; Mr. Justice Stewart's opinion for the Court in *Vlandis*, *supra*, joined by Justices Brennan, Marshall, Blackmun, and Powell, and Mr. Justice Stewart's concurring opinion in *Murry*, 413 U.S. at 516-17; Mr. Justice Marshall's concurring opinion in *Murry*, 413 U.S. at 518 (quoted on p. 53, *supra*); Mr. Justice White's opinion for the Court in *Stanley*, 405 U.S. at 656-57; and Mr. Justice Rehnquist's dissenting opinion, joined by the Chief Justice and Mr. Justice Powell, in

Murry, 413 U.S. at 524 (quoted on p. 46, *supra*).

Furthermore, legal scholars have recognized that, within limits such as we have suggested, the irrebuttable presumption doctrine of *Vlandis* is a principled and useful constitutional interpretation. Professor Laurence H. Tribe of Harvard, for example, has suggested such a limited application of the irrebuttable presumption doctrine to require individualized hearings in certain cases, calling that analysis "structural due process." See Tribe, *Structural Due Process*, 10 Harv. Civ. R. - Civ. Lib. L. Rev. 269 (1975). Among other things, Tribe made clear that:

> "If a certain fact, for example, unsuitability, has been made relevant, through statute or administrative rule, to the continued enjoyment of liberty or property, then the government's refusal to hear evidence on that fact – its insistence on making a factual finding without hearing from the person about whom the fact is found – is a denial of constitutional right." *Id.* at 287.

Bruce L. Ackerman has also suggested a conclusive presumption analysis much like the one we have suggested here. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. Pa. L. Rev. 761 (1977).[37] He concludes

[37]Ackerman identifies two principles to limit the irrebuttable presumption doctrine to manageable proportions. The first is that the doctrine applies only to provisions which, in Ackerman's words, serve "procedural objectives" or constitute a "procedural short cut" – by which he means that the provisions are obviously procedural mechanisms for determining a fact ultimately deemed crucial, rather than themselves embodying substantive policy objectives. 125 U. Pa. L. Rev. at 780. The second limitation is based on the feasibility of individualized determinations as an alternative to the conclusive presumption,

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that such an analysis "provides a means for assuring some minimal level of procedural fairness." *Id.* at 808. Professor Jonathan B. Chase of Colorado, too, has suggested an irrebuttable presumption analysis similar to the one we have proposed, calling that analysis "valuable," "workable," and "principled." Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 Colo. L. Rev. 653, 705 (1976).[38]

In addition, the due process principle underlying our analysis has been recognized and applied by this Court in other areas of the law. For example, in administrative law, it is established that, even where an agency is not required to adopt a particular rule, once it does so it is bound by the Due Process Clause to follow that rule in a particular case. See, *e.g.*, *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260

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and recognizes that even the procedural conclusive presumption can be justified "when individual harm is slight and administrative burdens would seriously weaken the efficacy of a government program" (*id.* at 796) or where there are no recognizable standards for determining the ultimate fact question (*id.* at 793).

[38]See also the thoughtful concurring opinion of Judge William J. Campbell in *Miller v. Carter*, 547 F.2d 1314, 1327-29 (7th Cir. 1977), where he suggested an irrebuttable presumption analysis with limitations arising primarily from *Salfi*, which limitations are similar to those we have identified. And see *Hodges v. Weinberger*, 429 F. Supp. 756, 760 (D. Md. 1977), where, in an opinion for a three-judge court, Judge Miller, the same district judge who decided the present case, appears to have recognized the distinction between a flat eligibility requirement for social welfare benefits and a conclusive presumption relating to an evidentiary determination of an ultimate fact on which eligibility turns.

(1954). So too here, the legislature may not be required to condition benefits or detriments on the existence of the particular fact with which it is concerned – but may instead be able to fashion a broad, flat, objective eligibility requirement. But once the legislature has elected to make the grant of benefits or the imposition of detriments turn on a certain fact, it is bound by the Due Process Clause to ensure that that test is met in the individual case, unless the difficulties in doing so are so great as to outweigh the individuals' interests.[39]

Thus, the analysis suggested here for applying the irrebuttable presumption doctrine of *Vlandis* comports with recognized principles of procedural due process. Accordingly, we submit that *Vlandis* should not be overruled but should be preserved as applicable in the circumstances and under the analysis which we have suggested.

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[39]A similar principle applies in the field of criminal law. A State is not constitutionally prohibited from changing its substantive criminal law to redefine the elements of a crime. Thus, for instance, a State may define as the crime of "felonious homicide" any intentional or reckless killing regardless of the degree of provocation. But if the state statute makes the absence of provocation an element of the crime, then it is prohibited by the Due Process Clause from placing the burden of showing provocation on the defendant, but must itself prove absence of provocation beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (distinguished, but preserved, in *Patterson v. New York*, 53 L.Ed.2d 281, 45 U.S.L.W. 4708 (June 17, 1977)). This holding demonstrates further that the fact that an enactment makes a particular fact crucial (there, to conviction for a certain crime; here, to entitlement to benefits), even if not required to do so, has important due process consequences.

4. Application of the Above Analysis in the Present Case Shows That the University's Policy Denies Due Process.

In applying the above analysis here, it is clear that the facts of the present case, like the facts in *Vlandis*, fall within the class of cases where an irrebuttable presumption denies due process of law. As we have shown, the University's policy plainly constitutes a conclusive presumption, for it makes Maryland domicile the crucial factor in determining in-state status and it then precludes all non-immigrant aliens from proving such domicile because they are presumed to lack the requisite intent to create such domicile. For G-4 visaholders this conclusive presumption is not universally true in fact. And the presumption cannot be justified through balancing the competing interests, since the G-4 visaholders have an important interest at stake, and since, in any event, the University can without much difficulty determine the domicile of such visaholders through individual hearings. Thus, the University's conclusive presumption of non-domicile for G-4 visaholders is fundamentally unfair to them and was properly held by the courts below to constitute a denial of procedural due process.

II.

THE UNIVERSITY'S POLICY BARRING G-4 VISAHOLDERS FROM THE OPPORTUNITY TO PROVE MARYLAND DOMICILE DISCRIMINATES AGAINST A CLASS OF ALIENS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The respondents argued below that the University's policy of flatly prohibiting G-4 visaholders from proving Maryland domicile denied them equal protection of the laws. While the courts below found it unnecessary to reach the question, the respondents reassert that argument in this Court as an alternative ground in support of the judgment in their favor. See *Hankerson v. North Carolina*, ____ U.S. ____, 53 L.Ed.2d 306, 314 n. 6 (1977), 45 U.S.L.W. 4707 (June 17, 1977).[40] Our argument here is significantly shorter in length than our due process analysis, since the argument here is less complex, the petitioner has not urged this Court to overrule any prior decision in this area, and we are able here to rely in certain respects on points already developed in the preceding section of this brief. But the equal protection violation shown here stands on its own feet, flows directly from a recent decision of this Court, *Nyquist v. Mauclet*, ____ U.S. ____, 53 L.Ed.2d 63, 45 U.S.L.W. 4655 (June 13, 1977), and provides an entirely adequate ground for affirming the judgment below.

[40] See note 1 on p. 2, *supra*.

A. The University's Policy Creates a Classification Based on Alienage and Is Therefore Subject to Strict Scrutiny.

This Court has made clear that state classifications based on alienage are suspect classifications and are consequently subject to strict judicial scrutiny in determining whether they violate the Equal Protection Clause. Thus, in *Graham v. Richardson*, 403 U.S. 365 (1971), the Court struck down a state statute that conditioned welfare benefits to aliens, but not citizens, on a durational residency requirement. It stated that the classification was based on the suspect criterion of alienage and was "therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired." *Id.* at 376. This holding was reaffirmed in *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973), *In re Griffiths*, 413 U.S. 717, 721 (1973), and *Examining Board v. Flores de Otero*, 426 U.S. 572, 601-02 (1976). Under this standard, in order to justify the use of the classification,

> "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, *supra*, 413 U.S. at 721-22 (footnote omitted).

Essentially the same formulation was set out in *Sugarman*, 413 U.S. at 642, and in *Flores de Otero*, 426 U.S. at 605. If the state classification cannot withstand this strict scrutiny, it cannot stand.[41]

[41] As discussed above (pp. 22-23, *supra*), the Court in *Mathews v. Diaz*, 426 U.S. 67 (1976), applied much more relaxed scrutiny

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This Court's decision last Term in *Nyquist v. Mauclet, supra,* again reaffirmed that "classifications by a State that are based on alienage are 'inherently suspect and subject to close judicial scrutiny,'" 53 L.Ed.2d at 69; and it made clear that this principle applies even when the state enactment discriminates only against a certain class of aliens rather than against all aliens. *Nyquist* involved a provision of a New York statute which barred state financial assistance for higher education to aliens who had neither applied for United States citizenship nor submitted a statement of intent to do so. New York contended that the statute "should not be subjected to . . . strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous class of aliens' and 'does not distinguish between citizens and aliens *vel non.*'" 53 L.Ed.2d at 70. This Court rejected that argument, pointing out that the statute "is directed at aliens and only aliens are harmed by it, . . . [and] the fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate against the class." *Id.* As the Court also explained, the state statute struck down in *Graham v.*

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in upholding a federal statute that created a classification based on alienage. That statute granted Medicare benefits to citizens and resident aliens who met a durational residency requirement, but denied them to other aliens. As we have pointed out, however, and as this Court has itself recognized, the petitioner "can draw no solace from the case [*Mathews*] . . . , because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States. *Id.*, at 84-87." *Nyquist v. Mauclet, supra,* 53 L.Ed. 2d at 70 n. 8.

Richardson, supra, had likewise not prohibited *all* aliens from obtaining welfare benefits, but only those who did not meet a durational residency requirement.

Nyquist clearly governs this case. The University's policy barring G-4 (and other non-immigrant) aliens from ever proving Maryland domicile discriminates against that class of aliens by subjecting them to a restriction not faced by American citizens and immigrant aliens similarly situated.

The petitioner, however, attempts to avoid the controlling force of *Nyquist* by maintaining that the University's policy is not directed at and does not harm only aliens, but "is directed at and disadvantages only nondomiciliaries, a class which includes some United States citizens as well as some aliens" (Pet. Br. 30). The upshot of the petitioner's contention, then, is that the University's policy does not discriminate against non-immigrant aliens, but treats them just like other non-domiciliaries, including citizens and immigrant aliens.

This argument is plainly erroneous. Whether or not the University's policy constitutes an unconstitutional irrebuttable presumption of non-domicile for non-immigrant aliens, it clearly treats non-immigrant aliens differently from citizens and immigrant aliens for purposes of proving domicile. Citizens and immigrants are given the opportunity to show Maryland domicile and thus to obtain in-state status for admission, tuition, and fees. Non-immigrant aliens are not. The basis for the petitioner's argument that this is not a discrimination against the non-immigrant class of aliens, but only against non-domiciliaries, is that non-immigrant aliens as a class are in fact unable to be domiciled in Maryland.

We have answered this contention on pp. 29-41, *supra.* As we showed there, the University's assumption that all non-immigrant aliens are legally disabled from having the requisite intent to establish a Maryland domicile is not necessarily or universally true for the holders of G-4 visas and of the few other similar visa types that permit creation of an American domicile. Yet the G-4 and similar non-immigrant visaholders who are in fact Maryland domiciliaries are prevented by the University's policy from proving their domicile so as to obtain in-state status. No other Maryland domiciliaries must face such a restriction.

In short, the University's policy classifies between, on the one hand, citizens and immigrant aliens, who can prove Maryland domicile, and, on the other, the G-4 and other non-immigrant aliens for whom such domicile is also possible in fact, but who are denied the opportunity to prove it. As in *Nyquist,* this classification obviously is directed at and disadvantages *only* aliens (even though not all aliens), and it is therefore a suspect classification subject to strict scrutiny.

B. The Interests Asserted in Support of the University's Policy Cannot Withstand a Strict Scrutiny Test.

In his brief in the Fourth Circuit (p. 32), the petitioner conceded that the interests purportedly underlying the University's policy "will not withstand a 'strict scrutiny' Equal Protection standard . . . ." He does not appear to have changed his position on this issue, for his brief in this Court asserts only that those

interests are "sufficient in light of the mere rational basis" which he says is the proper test (Pet. Br. 29). In any event, the petitioner was clearly correct in concluding that the asserted interests do not justify the University's policy under strict scrutiny.

The first interest asserted by the petitioner is the interest in limiting governmental expenditures to persons with a greater affinity to the United States. As stated above (p.22-23,*supra*), however, this Court specifically held in *Nyquist* that the "national affinity" interest "is not a permissible one for a State." 53 L.Ed.2d at 71. Moreover, the Court in *Nyquist* went on to find that, even if that were a valid interest, it was inadequate to support the State's discrimination against a class of aliens. *Id.* at 71-72. The "national affinity" interest likewise fails here.

As to the asserted interest in cost equalization based on past tax contributions, this Court explicitly held in *Shapiro v. Thompson,* 394 U.S. 618, 632-33 (1969), under a strict scrutiny analysis, that the Equal Protection Clause forbids the apportionment of state benefits according to the past tax contributions of its citizens. See also *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 266 (1974). Thus, the University's policy cannot be upheld as necessary to promote a substantial interest of the State in cost equalization. Indeed, as shown on pp. 23-24, *supra,* the policy is not even reasonably related to that objective.

The University's policy is also manifestly not necessary in order for a proper determination of domicile to be made. In order to determine whether the holder of a G-4 or similar visa is domiciled in Maryland, the University need only use the procedures it now uses

for American citizens and immigrant aliens. The possibility that this might increase the University's administrative burden to some extent cannot, for the reasons given on pp. 25-27, *supra*, justify its discrimination against the class of aliens involved here, particularly since any such increased burden would be so minor. See *Stanley v. Illinois*, *supra*, 405 U.S. at 658.

The final interest asserted by the petitioner – that the University's policy prevents disparate treatment among non-immigrant aliens – cannot be taken seriously in light of the fact, discussed above, that different categories of non-immigrant aliens are, under the federal immigration laws, differently situated with respect to their ability to show domicile in the United States. See pp. 27-29, *supra*.

Since the University's policy of flatly prohibiting G-4 visaholders from proving Maryland domicile thus cannot be justified under a strict scrutiny standard, that policy must be held to deny to such visaholders the equal protection of the laws guaranteed by the Fourteenth Amendment.[42]

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[42]Even if that policy could be said not to trigger the strict scrutiny standard, it would still be void under the Equal Protection Clause as not rationally related to a legitimate state objective. See, *e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The "national affinity" interest, as we have said, has been held by this Court to be an impermissible one for a State. Moreover, the distinction which the policy draws between immigrant aliens and non-immigrant aliens is essentially arbitrary and without a rational basis as it affects holders of G-4 visas. As shown on pp. 29-41, *supra*, there is no relationship between, on the one hand, the holding of a G-4 rather than an immigrant visa and, on the other, an individual's intent to establish his domicile in Maryland. We have further demonstrated (pp. 23-24, *supra*)

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III.

THE UNIVERSITY'S POLICY VIOLATES THE SUPREMACY CLAUSE.

The decision below can also be supported on another ground raised by the respondents in the trial court though not reached by that court – namely, that the University's policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause of the Constitution.

It is established that, under the Supremacy Clause, States may not encroach upon the exclusive federal power over, and policies involving, immigration and naturalization. *Graham v. Richardson*, *supra*, at 376-80, *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The

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that there is no relationship between the holding of a G-4 rather than an immigrant visa and any alleged interest of the University in cost equalization based on tax contributions. Even if a G-4 employee of the IDB or the World Bank were able to change his visa status to that of an immigrant, the State still could not, because of international agreements and the federal statutes implementing such agreements, levy the state income tax on his income from the bank. Yet the University has admitted that, in such a case, it would allow the immigrant alien to show Maryland domicile, whereas it prohibits G-4 aliens from doing so, despite the fact that the two situations are the same so far as achieving or not achieving the purported purpose of cost equalization is concerned. Furthermore, for the reasons on pp. 24-27, *supra*, administrative convenience is not enough by itself, in the circumstances of the present case, to justify the policy even under the more relaxed standard. Finally, the asserted interest in preventing disparate treatment among non-immigrant aliens cannot support the policy when those aliens are in fact not similarly situated in terms of their ability to show American domicile.

University's policy at issue here imposes on G-4 and other non-immigrant visaholders restrictions not imposed on citizens and immigrant visaholders; it conditions the right of such non-immigrant aliens to show Maryland domicile on their changing their immigration status to that of permanent resident; and it thus provides a financial incentive for them to change their visa status. In these ways, the University has unlawfully intruded into the immigration field – an area occupied by the Federal Government because it is "one of the most important and delicate of all international relationships." *Hines v. Davidowitz, supra,* at 64. Such considerations, too, support an affirmance by this Court of the decision below.

CONCLUSION

For these reasons, the respondents respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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